

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re THE LOEWEN GROUP INC.
SECURITIES LITIGATION

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CIVIL ACTION
NO. 98-6740

O'NEILL, J.

DECEMBER , 2002

MEMORANDUM

BACKGROUND

This matter was originally a series of purported securities class actions brought against the Loewen Group, Inc., a publicly held company specializing in the operation of funeral homes and cemeteries, as well as a number of the company's individual officers and directors. The complaints essentially alleged that Loewen Group made inaccurate or incomplete disclosures regarding the financial condition of the company, and that certain individuals in their capacities as officers and directors of Loewen Group either deliberately falsified these disclosures or did not correct them. Plaintiffs¹ bring their claims under sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78(b) and 78(t), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

The actions pending against Loewen Group were consolidated under Fed. R. Civ. P. 42(a)

¹ Lead plaintiffs are the City of Philadelphia through its board of Pensions and Retirement which purchased or otherwise acquired Loewen Group common stock, preferred stock or call options during the class period.

by Order dated April 14, 1999, but were placed in the Civil Suspense Docket on June 9, 1999, pending the outcome of Loewen's bankruptcy proceeding. On July 7, 1999 plaintiffs moved to remove the action from suspense in order to permit them to proceed against the individual defendants only. This motion was denied by Order dated November 9, 1999. Plaintiffs filed a motion for reconsideration on November 22, 1999. This motion was denied by Order dated December 10, 1999. On January 18, 2001 plaintiffs filed a renewed motion to remove the consolidated action from the civil suspense docket in order to proceed against the individual "non-debtor" defendants. This motion was denied by Order dated May 16, 2001. The action was removed from suspense on December 19, 2001. Plaintiffs filed a consolidated class action complaint on February 1, 2002.

In this memorandum I consider the motions to dismiss the consolidated class action complaint filed by Lawrence Miller, William R. Shane and William Grant Ballantyne. Plaintiffs filed briefs in response to these motions. The individual defendants filed replies to plaintiffs' briefs.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion under Rule 12(b)(6) is the proper manner in which to raise defense that a claim is time-barred. Hanna v. U.S. Veteran's Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir. 1975). If plaintiffs did not name Miller, Shane and Ballantyne in a complaint within the applicable limitations period, their claims should be dismissed.

DISCUSSION

Lawrence Miller was Loewen's Executive Vice-President, Operations, and a member of the executive committee until his resignation in 1998. William Shane was the Senior Vice-President and Chief Financial Officer of the company's cemetery and combination group until his resignation in 1998. William Ballantyne was the Loewen Group's Senior Vice-President, Financial Control and Administration. The pleadings do not make clear when his employment ended, if indeed it has.

These three defendants maintain, in addition to several other arguments that I will not address here, that plaintiffs claims against them are time barred. When this suit was originally filed in December, 1998, defendants Miller, Shane and Ballantyne were not named as defendants. They were first named as defendants in plaintiffs' consolidated complaint, which was filed on February 1, 2002. These defendants argue that a three year limitations period bars the claims against them.

Plaintiffs respond to the limitations period argument in several ways. First, plaintiffs claim that the three year limitations period does not apply to this case. Second, they contend that the limitations period was tolled by my Order denying their motions to remove the action from suspense. I do not agree.

The limitations period applicable to this case was settled by the Supreme Court when it determined that "litigation instituted pursuant to §10(b) and Rule 10b-5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." Lamph v. Gilbertson, 501 U.S. 350, 364 (1991). The same limitations period applies to plaintiffs' section 20(a) claim because it is a derivative claim related to section

10(b) violations. Tracinda Corp. v. Daimler Chrysler AG, 197 F. Supp. 2d 42, 55 n. 5 (D. Del. 2002); accord Theoharous v. Fong, 256 F.3d 1219, 1228 n.12 (11th Cir. 2001).

Although an Act creating a new statute of limitations has been approved by Congress and signed by the President, that Act is inapplicable to this case. The new Act says that its limitations period “shall apply to all proceedings . . . that are commenced on or after the date of this Act.” Public Law 107-204, Title VIII, § 804(b), July 30, 2002, 116 Stat. 801. The Act was signed by President Bush on July 30, 2002. Plaintiffs filed the consolidated class action complaint on February 1, 2002. The attorney for Miller and Shane accepted service on their behalf on March 8, 2002. Ballantyne was served with a summons on June 20, 2002. The action against these three defendants was commenced before the date of the Act and, therefore, the Lamph limitations period is controlling in this case.

Plaintiffs’ claims against Miller, Shane and Ballantyne are time barred under the Lamph limitations period. Plaintiffs identify the class period as March 5, 1997 to January 14, 1999. Consol. Class Action Compl. ¶ 1. The last violation alleged in the complaint could have occurred no later than January 14, 1999. Plaintiffs therefore had until January 14, 2002 to commence an action pursuant to section 10(b), Rule 10b-5 and section 20(a). Various plaintiffs commenced actions against Loewen Group and several individual defendants in December 1998. No complaint named Miller, Shane or Ballantyne as defendants prior to the consolidated class action complaint filed on February 1, 2002. The time between the end of the class period and the initiation of claims against Miller, Shane and Ballantyne is more than three years.

My order of April 14, 1999, which consolidated a number of actions pending against Loewen Group and several related defendants, expressly allowed for the filing of additional

actions. Pretrial Order No. 1 ¶ 6. The placement of the consolidated action in the civil suspense file did not preclude plaintiffs from filing an additional complaint naming new defendants and their doing so would not have placed plaintiffs in danger of being held in contempt. See KA Investments LDC v. Number Nine Visual Tech. Corp., 2002 U.S. Dist. LEXIS 18690 at * 23 (D. Mass. August 26, 2002) (“The bankruptcy stay provisions do not provide a basis for any stay or consequent tolling with respect to the officers of a company that has filed for bankruptcy . . .”). Claims made in any new complaints relating to the same matter would have been consolidated with the actions in the civil suspense file. The action would not have proceeded, but Miller, Shane and Ballantyne would have been served and officially put on notice that they were being sued.

Although I do not think that plaintiffs needed permission to file a complaint against Miller, Shane and Ballantyne while the previously-filed actions were in the civil suspense file, plaintiffs could have filed a motion for leave to file a complaint against these defendants. Plaintiffs did not do so. Instead they repeatedly requested that the action be removed from the civil suspense file. It was improper at those times to restore the action to the active docket, but, as I have already stated, its removal from suspense was not the only manner in which plaintiffs could have added defendants.

An appropriate Order follows.

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ORDER

AND NOW, this day of December, 2002, after consideration of the motions to dismiss filed by Lawrence Miller, William R. Shane and William Grant Ballantyne and the responses thereto, and for the reasons set forth in the accompanying memorandum, the motions are GRANTED. The claims filed by plaintiffs against Miller, Shane and Ballantyne are DISMISSED WITH PREJUDICE. Pursuant to Federal Rule of Civil Procedure 54(b), I determine that there is no just reason for delay and direct the entry of judgment against plaintiffs and in favor of defendants Miller, Shane and Ballantyne.

THOMAS N. O'NEILL, JR., J.